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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1601

WILLIAM E. CHRISTENSEN,

Petitioner,

vs.

BOARD OF EDUCATION TOWNSHIP HIGH SCHOOL DISTRICT NO. 203; SEYMOUR GALE, PRESIDENT OF THE BOARD; PETER TODHUNTER, MRS. WILLIAM BOONE, MRS. EDWARD HOFFMAN, MR. STANLEY HUGHEY, MRS. HULBURD WAMPLER, LAWRENCE GOUGLER, MEMBERS OF THE BOARD; S. FRANCIS OVERLAN, ACTING SUPERINTENDENT; DAVID H. COX, PRINCIPAL; ERLE W. LAIR, DIRECTOR OF STUDENT SERVICES; ANN ALBERT, DIRECTOR OF INSTRUCTIONAL SERVICES; ROBERT W. JEWELL; ADMINISTRATIVE SUPERVISOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. .....

WILLIAM E. CHRISTENSEN,

Petitioner,

vs.

BOARD OF EDUCATION TOWNSHIP HIGH SCHOOL DISTRICT NO. 203; SEYMOUR GALE, PRESIDENT OF THE BOARD; PETER TODHUNTER, MRS. WILLIAM BOONE, MRS. EDWARD HOFFMAN, MR. STANLEY HUGHEY, MRS. HULBURD WAMPLER, LAWRENCE GOUGLER, MEMBERS OF THE BOARD; S. FRANCIS OVERLAN, ACTING SUPERINTENDENT; DAVID H. COX, PRINCIPAL; ERLE W. LAIR, DIRECTOR OF STUDENT SERVICES; ANN ALBERT, DIRECTOR OF INSTRUCTIONAL SERVICES; ROBERT W. JEWELL; ADMINISTRATIVE SUPERVISOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, William E. Christensen, prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered December 26, 1973 in Case No. 73-1152 (Appendix A) which order was denied a rehearing on January 25, 1974 (Appendix B). Said order affirmed a summary judgment granted to the respondents by the United States District Court for the Northern District of Illinois, Eastern Division, on December 11, 1972 in Case No. 72 C 745 (Appendix C).

OPINIONS BELOW.

The Court of Appeals for the Seventh Circuit entered its original order and unpublished opinion on December 26, 1973. This order and opinion appear at Appendix A. The Court of Appeals for the Seventh Circuit denied a petition for rehearing on January 25, 1974. This order appears at Appendix B. The District Court for the Northern District of Illinois Eastern Division, rendered its unpublished memorandum opinion and order on December 11, 1972. This memorandum opinion and order appears at Appendix C.

JURISDICTION.

The petitioner's request for a rehearing was denied by the Court of Appeals for the Seventh Circuit on January 25, 1974. This Petition for a Writ of Certiorari was filed within 90 days of said date. The jurisdiction of this Court is invoked under Rule 19 of the Rules of the Supreme Court of the United States and 28 U. S. C. 1254(1) which provide for review by Writ of Certiorari of a final judgment by a Court of Appeals.

QUESTIONS PRESENTED.

The questions presented are:

1) Whether the exclusive use of and reliance upon hearsay evidence in an administrative hearing violated petitioner's right to substantive due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2) Whether petitioner was sufficiently deprived of a liberty interest so as to be entitled to the protections of procedural due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3) Whether the exclusive use of and reliance upon hearsay evidence in an administrative hearing violated petitioner's

right to procedural due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The texts of the pertinent constitutional and statutory provisions are found at Appendix D. The pertinent provisions are:

The Fourteenth Amendment to the Constitution of the United States, Section 1.

STATEMENT OF FACTS.

Petitioner, William E. Christensen, was employed by contract with the respondent Board of Education, Township District No. 203, Illinois, as a non-tenured high school teacher for the school year 1970-71. On March 22, 1971 the respondent Board effected an action directing that Christensen not be rehired for the following school year, petitioner being notified of said action by a letter from the Superintendent of the New Trier Township Schools on March 23, 1971.

Shortly thereafter, Christensen requested a bill of particulars outlining the reasons for his termination and asked for a hearing on the matter. Both of these requests were initially denied.

On September 16, 1971, petitioner repeated his demand for a hearing. Such a hearing was scheduled by the defendant Board and ultimately held on January 17, 1972 with both petitioner and respondents being represented by counsel. The requested bill of particulars was not provided prior to the hearing. Testimony was taken from witnesses and a transcript thereof prepared. Two weeks after this hearing, the Board's decision not to renew plaintiff's contract was ratified and confirmed.

The evidence presented by the respondents at the January 17, 1972 hearing consisted exclusively of second-hand accounts of alleged episodes between petitioner and students, parents of

students or school personnel. Respondents stated that such hearsay evidence was necessary because information in a school environment is usually transmitted by a "grapevine" process. Self-evidently, the use of hearsay evidence foreclosed confrontation and cross-examination on behalf of the petitioner.

At the January 17, 1972 hearing, testimony was elicited from respondent Cox, principal of the school where petitioner taught, concerning a letter he had written to petitioner May 27, 1971 outlining the reasons for petitioner's dismissal. Cox stated that this letter found its basis in a memorandum prepared by the respondents Albert and Lair on March 17, 1971. This memorandum consisted of a rendition of alleged incidents of which Albert and Lair had no personal knowledge. These same incidents were the subject of the hearsay evidence presented at the January 17, 1972 hearing.

Following the reaffirmation of his dismissal, petitioner brought his cause before the United States District Court for the Northern District of Illinois, Eastern Division, alleging, *inter alia*, that the exclusive use of hearsay evidence had compromised his substantive and procedural due process rights. On December 11, 1972, the District Court granted the respondents' motion for a summary judgment (Appendix C).

Petitioner then appealed to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court judgment on December 26, 1973 (Appendix A), holding in pertinent part that the reasons given for petitioner's dismissal related to his teaching ability, thus not stigmatizing him to an extent which would impair his liberty interest and bring the protections of procedural due process into consideration. Moreover, the Court stated, "Plaintiff's argument to the contrary notwithstanding, the reliance upon hearsay evidence by a School Board does not by itself raise a genuine question of 'substantive due process.'" Petitioner than sought a rehearing which was denied on January 25, 1974 (Appendix B).

PRESENTATION OF THE FEDERAL QUESTION.

Each of the three federal questions presented herein was originally raised in the District Court proceeding. The same questions were preserved in the Court of Appeals.

REASONS WHY THE WRIT SHOULD BE GRANTED.

(1) The Exclusive Use of and Reliance Upon Hearsay Evidence in an Administrative Proceeding Violated Petitioner's Right to Substantive Due Process as Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

One of the requirements of "substantive due process" is that before a governmental sanction can be imposed on an individual the reasons for that sanction must have a basis in fact, *Roth* v. *Board of Regents*, 310 F. Supp. 972, 979 (W. D. Wis. 1970); *affirmed*, 446 F. 2d 806 (7th Cir. 1971); *reversed on other grounds*, 408 U. S. 564 (1972). See: *Fisher* v. *Snyder*, 476 F. 2d 375 (8th Cir. 1973) wherein the court stated:

> "The school board's inference of misconduct was arbitrary and capricious and therefore constituted an impermissable reason for terminating her employment, since the inference lacked any basis in fact."

A sanction grounded in hearsay evidence has no such basis.

Very early in its history, the United States Supreme Court rejected the use of hearsay evidence to sustain a judgment:

> "(H)earsay evidence is incompetent to establish any specific fact, which fact is, in its nature, susceptible of being proved by witnesses, who speak from their own knowledge."
>
> *Queen* v. *Hepburn*, 11 U. S. 290, 293 (1813).

This rule, stated so cogently over 160 years ago, is equally applicable at present—a decision which must have a basis in

fact will not find that basis in hearsay evidence where first person testimony is available.

In *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 230 (1938), Chief Justice Hughes stated, "Mere uncorraborated hearsay or rumor does not constitute substantial evidence." In certain specific settings this statement has been distinguished to allow the sustaining of an administrative judgment supported by hearsay, but these situations are not analogous to the case of the petitioner herein. For example, in *Richardson* v. *Perales*, 402 U. S. 389 (1971), the court allowed the use of unsworn medical reports. However, the Court pointed out the traditional reliability of written medical findings and significantly stated that where the hearsay evidence is less reliable and probatively valuable, Chief Justice Hughes' rule of law still holds true. To compare the reliability of licensed physicians performing their objective professional tasks with that of students, their parents, and school personnel, who very likely may be piqued at a teacher for reasons such as poor grades or petty jealousies, is on its face, absurd.

Of a more germane nature is the case of *Jacobowitz* v. *United States*, 424 F. 2d 555 (Ct. of Claims, 1970), in which the court considered the use of hearsay evidence consisting of statements taken from taxpayers during an investigation leading to the termination of plaintiff's employment with the Internal Revenue Service. The court held that these statements could not sustain a judgment adverse to the plaintiff, stating, "even though uncorroborated hearsay may have some probative value, it may lack sufficient probative force, standing alone, to constitute evidence that will support a decision of an administrative agency." (424 F. 2d at 561.) See also: *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 691 (9th Cir. 1949) wherein the court stated:

> "The degrees of probative force and reliability of hearsay evidence are infinite in variation, and its use by administrative bodies, ex necessitate, must in part be governed by

> the relative unavailability of other and better evidence includes more than 'uncorroborated hearsay' and 'more than a mere scintilla,' the findings, to be valid, cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla."

In addition, the opinion of the Court of Appeals completely ignores and in essence rejects all Illinois decisional precedent relating to administrative determinations involving hearsay evidence, which prohibits the use of hearsay evidence in an administrative proceeding to the same extent such evidence would be excluded in a judicial hearing, *Werner* v. *Community Unit School District No. 4*, 40 Ill. App. 2d 491, 190 N. E. 2d 184 (1963); *Chandler* v. *East St. Louis School District 189*, 35 Ill. App. 2d 317, 182 N. E. 2d 774 (1962); and *Allione* v. *Board of Education of South Fork Community High School District No. 310*, 29 Ill. App. 2d 261, 173 N. E. 2d 13 (1961).

The Order of the Court of Appeals, in addition to being contrary to applicable decisional law, threatens to open a Pandora's Box of due process abuses by administrative agencies if left to stand as precedent. The implicit nature of hearsay testimony would allow misguided or capricious authorities the ability to impose governmental sanctions based upon pure fabrication, unsubstantiated rumor or baseless assertions. Accordingly, petitioner herein respectfully submits that this Court grant a Writ of Certiorari in order to review this decision and thwart the injustices which it will necessarily engender if it remains as the final statement in this cause.

(2) The Petitioner Was Sufficiently Deprived of a Liberty Interest So as to Be Entitled to the Protections of Procedural Due Process as Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

As the Court of Appeals correctly stated in its December 26, 1973 Order, the United States Supreme Court in *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), held that the proce-

dural rights guaranteed by the Due Process Clause of the Fourteenth Amendment are triggered only when a person's liberty or property interests are infringed upon. However, the Court of Appeals further stated that since the reasons given for petitioner's dismissal concerned his performance as a teacher he was not stigmatized in a way which would foreclose his employment opportunities, such stigmatization being the deprivation of the liberty interest as defined in *Roth*. The Court of Appeals instead compared the grounds for the termination in the instant case with those suggested by the *Roth* court, i.e. charges of dishonesty or immorality, and implied that the stigma inherent in those two allegations is the kind the *Roth* court sought to protect against while the charges made against petitioner do not affect his liberty interest under the Due Process clause.

Petitioner herein respectfully submits that the Court of Appeals misinterpreted the *Roth* decision. The court in *Roth* merely suggested dishonesty and immorality as non-exclusive examples of liberty infringing stigmatizations and decisional law prior to and following *Roth* clearly shows that allegations concerning the ability of a nontenured public employee likewise give rise to due process safeguards.

In *Wilderman* v. *Nelson*, 467 F. 2d 1173 (8th Cir. 1972), the Court of Appeals considered the case of a nontenured Missouri social worker who was dismissed for "your attitude toward the agency and the administration of the St. Louis City Welfare Office." This is an analogous charge to one of the allegations made against petitioner herein. The court, in holding this charge to be a stigma requiring due process before imposition, stated that the decision in *Roth* required such protection when it is shown that "governmental conduct likely will . . . impose a stigma upon the employee that will foreclose future opportunities to practice his chosen profession . . ." (467 F. 2d at 1176). See also: *Harnett* v. *Ulett*, 466 F. 2d 113, 116 (8th Cir. 1972).

In *Ortwein* v. *MacKey*, 358 F. Supp. 705 (M. D. Fla. 1973), the plaintiff was a nontenured teacher who was dismissed from employment on the basis of his "lack of performance in the functional areas of his teaching responsibilities." The plaintiff contended that such a conclusion as to his ability was the type of stigma perceived in *Roth*. The court agreed, stating, "By terminating plaintiff for reasons of 'non-performance', without according him an opportunity to be heard at a procedurally sound hearing, the government through the University has deprived plaintiff of liberty without due process of law." (358 F. Supp. at 713.)

A similar result was reached in *Whitney* v. *Board of Regents*, 355 F. Supp. 321 (E. D. Wis. 1973), wherein the plaintiff, a nontenured teacher, was terminated upon assertions that he was an inadequate and immature instructor. Interpreting *Roth*, the court held, "I find that the charges of inadequacy and immaturity were likely to injure plaintiff's reputation, and that, therefore, he was entitled to a public hearing to 'clear his name.'" (355 F. Supp. at 323.)

The petitioner herein firmly believes that the aforementioned cases best define what constitutes a stigma under the directive of *Roth*. What accusation could more surely foreclose one's employment opportunities in his chosen profession than a charge that he is unable to perform that task effectively? Recognizing this, petitioner herein respectfully submits that his "liberty" interest has been infringed upon and that the Court of Appeals misinterpreted *Roth* on this issue in holding otherwise.

Moreover, the diversity of interpretations that have been given to the *Roth* decision, as evidenced by the decisions above and the instant case, show the need for a clearer set of guidelines with which administrators and public employees can work. For that reason and for the erroneous nature of the Court of Appeals' decision herein petitioner respectfully submits that the matter is of substantial importance and prays that a Writ of Certiorari be granted.

(3) The Exclusive Use of and Reliance Upon Hearsay Evidence in an Administrative Proceeding Violated Petitioner's Right to Procedural Due Process as Guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Due to the Court of Appeals' determination that petitioner's liberty interest was not infringed, the Court did not adjudicate the issue of whether or not the pervasive hearsay evidence introduced against the petitioner, and upon which the administrative decision was substantially found, constituted a violation of procedural due process. Although the Court, by *dicta,* stated that the plaintiff herein received a full and fair hearing, it is self-evident that this area of the present case would have received considerably more deliberation absent the conclusion concerning the liberty interest.

Assuming therefore that this Court finds that plaintiff's liberty interest was indeed violated, it is necessary to determine whether or not the exclusive use of hearsay evidence fundamentally denied plaintiff the requisite procedural due process. An examination of the relevant decisional law mandates a conclusion that such use of hearsay evidence was violative of petitioner's right to a full and fair hearing.

In *Whitney* v. *Board of Regents,* 355 F. Supp. 321 (E. D. Wis. 1973), the court, after establishing that the plaintiff's liberty interest had been infringed, outlined the procedural requirements which must be followed before a stigma can attach to a public employee. Among these prerequisites is, "An opportunity to confront and cross-examine opposing witnesses under oath." The use of hearsay evidence obviously precludes such an opportunity and therefore a judgment resting on such evidence must be stricken. See: *Greene* v. *McElroy,* 360 U. S. 474 (1959) and *Sterzing* v. *Fort Bend Independent School District* (S. D. Tex. May 1, 1972), wherein the court found that a stigmatized teacher was entitled to procedural due process and stated, "It is entirely unfitting that such a board should be

swayed by the hearsay remarks of persons not in possession of the facts, without specifically warning the accused of the contemplated action and allowing him a fair and impartial hearing before they act."

In *Hostrop* v. *Board of Junior College District No. 515*, 471 F. 2d 488, 495 (7th Cir. 1972), the Court of Appeals also listed those steps necessary for a compliance with procedural due process before a public employee is terminated. Among these requirements is, " . . . a chance to present witnesses and confront adverse evidence at the hearing." Cf.: *McNeill* v. *Butz*, 480 F. 2d 314 (4th Cir. 1973). It would seem inconsistent and incongruous to apply these standards to administrators and not teachers.

The administrative finding of the respondent Board was based upon the second-hand repetition of allegations made by students, parents of students, and personnel employed by the respondents. Petitioner, by reason that the testimony was pure hearsay, had no opportunity to confront and cross-examine those persons whose characterizations provided the basis for the termination of his employment. Confrontation of such alleged witnesses was constitutionally fundamental prior to such termination. Petitioner herein respectfully submits that such a fundamental violation of his due process rights cannot be countenanced by this Court.

Lastly, it should be noted that petitioner's request for a bill of particulars prior to the hearing was not complied with in a manner consonant with the underlying principles of procedural due process.

CONCLUSION.

Petitioner, William E. Christensen, has been denied those fundamental rights which must be afforded in our public educational systems. To base a decision regarding a teacher's livelihood and future career upon hearsay, is contrary to basic constitutional principles. Such a result, along with the confusion generic to diverse court opinions, cannot go unchallenged in the community of American schools.

Wherefore, for the foregoing reasons, petitioner respectfully prays for a Writ of Certiorari to United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A.

ORDER AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued December 10, 1973
December 26, 1973

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

WILLIAM E. CHRISTENSEN,
Plaintiff-Appellant,

No. 73-1152 *vs.*

BOARD OF EDUCATION TOWNSHIP HIGH SCHOOL DISTRICT NO. 203; SEYMOUR GALE, President of the Board; PETER TODHUNTER, MRS. WILLIAM BOONE, MRS. EDWARD HOFFMAN, MR. STANLEY HUGHEY, MRS. HULBURD WAMPLER, LAWRENCE GOUGLER, Members of the Board; S. FRANCIS OVERLAN, Acting Superintendent; DAVID H. COX, Principal; ERLE W. LAIR, Director of Student Services; ANN ALBERT, Director of Instructional Services; ROBERT W. JEWELL, Administrative Supervisor,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 745

Richard W. McLaren, Judge.

ORDER.

During 1970-71, plaintiff was employed by the New Trier Township Board of Education as a high school English teacher. On May 27, 1971, plaintiff received a letter from the principal of the school at which he taught, informing him of the reasons why he would not be offered a contract for the forthcoming school year. On June 2, plaintiff requested a bill of particulars and a hearing, which the Board denied on June 9. On July 1, this court decided *Roth* v. *Board of Regents*, 446 F. 2d 806, which required a hearing for a person in plaintiff's circumstances. On September 16, by counsel, plaintiff again requested a hearing. That request was granted, and on January 17, 1972, a hearing was held, at which both parties were represented by counsel, and a transcript prepared. On January 31, the Board ratified the decision not to renew. Thereafter, plaintiff filed this complaint pursuant to 42 U. S. C. § 1983. Relying upon the Supreme Court's reversal of our decision in *Roth*, 408 U. S. 564, the district court granted defendants' motion for summary judgment.

On appeal plaintiff argues that, notwithstanding *Roth*, he was entitled to a hearing; that the hearing he received was inadequate to conform to the standards of procedural due process; and that the alleged reliance upon hearsay adduced at the hearing in the Board's decision to adhere to its original determination not to renew the plaintiff's contract violated substantive due process. We conclude that the district court did not err.

In its opinion in *Roth*, the Supreme Court held that the procedural rights guaranteed by the Due Process Clause of the Fourteenth Amendment are triggered only by a deprivation of a person's property or his interest in liberty. Plaintiff did not have tenure in his teaching position; therefore no claim of a deprivation of property can arise. See *Perry* v. *Sindermann*, 408 U. S. 593. If he was entitled to a hearing, then it must be on account

of a deprivation of his liberty. In *Roth*, the Supreme Court recognized that an interest in liberty may be placed in issue by a decision not to rehire which is based, for example, on a charge of dishonesty or immorality, or which creates such a stigma as to foreclose future employment opportunities.

In the present case, plaintiff argues in effect that he was stigmatized by the Board's action. However, the reasons for plaintiff's nonretention[1] merely indicate that the School Board was dissatisfied with plaintiff's performance as a teacher. *Suarez* v. *Weaver*, 484 F. 2d 678 (7th Cir. 1973), is quite different. In that case, the reasons assigned for the nonrenewal of a physician's contract were irregularities connected with the extent to which he was prescribing narcotics. That charge, together with the fact that it was conveyed to the agency responsible for licensing and disciplining Illinois physicians, constituted damage to the doctor's reputation and a serious threat to his continued eligibility to practice his profession. The present case involves no such serious consequences. On the contrary, it is clearly controlled by our second opinion in *Shirck* v. *Thomas*, ... F. 2d ..... (7th Cir. April 6, 1973).

Even assuming *arguendo* that plaintiff's interest in liberty was impaired by the Board action, we are satisfied that the hearing afforded by the Board met the requirements of the Constitution. See our first opinion in *Shirck* v. *Thomas*, 447 F. 2d 1025, 1027-1028 (1971). If a hearing is required in a case in which a liberty interest of the discharged employee is at issue, the *constitutional* reasons for the hearing is to afford the employee an opportunity to clear his name; it is his "liberty" interest in his good name which has been infringed. The hearing the Board held in plaintiff's case was full and fair. Both parties were represented by counsel, witnesses were called, and a transcript was prepared. Plaintiff did not testify in his own behalf, but there is no suggestion that he would have been pre-

1. See Brief for appellee at 22-23.

vented from doing so. The procedure amply enabled plaintiff to attempt to clear his name.

Finally, plaintiff argues that the decision of the Board not to rehire him, after the hearing, was constitutionally impermissible because the complaints levied against him at the hearing were supported by mere uncorroborated hearsay. We disagree with this characterization of the entire record before the Board; but even if it did rely entirely on hearsay, such reliance is constitutionally unobjectionable since the plaintiff received adequate notice and a fair opportunity to be heard.

It is well known that "hearsay evidence . . . has a wide scale of reliability, from the highest to the lowest . . .," McCormick, EVIDENCE, § 246, p. 584. There is no allegation that the evidence relied upon by the Board was so untrustworthy as to make action based upon it capricious, see *United States ex rel. Campbell* v. *Pate*, 401 F. 2d 55, 57 (7th Cir. 1968). Plaintiff's argument to the contrary notwithstanding, the reliance upon hearsay evidence by a School Board does not by itself raise a genuine question of "substantive due process."

The judgment of the district court is accordingly

AFFIRMED.

APPENDIX B.

ORDER OF THE UNITED STATES COURT APPEALS FOR THE SEVENTH CIRCUIT.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
January 25, 1974.

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*

WILLIAM E. CHRISTENSEN,
Plaintiff-Appellant,

No. 73-1152 *vs.*

BOARD OF EDUCATION, TOWNSHIP HIGH SCHOOL DISTRICT No. 203, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(72 C 745)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no Judge in active service having requested a vote thereon, nor any Judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing.

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby DENIED.

APPENDIX C.

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

WILLIAM E. CHRISTENSEN,
Plaintiff,
vs.
BOARD OF EDUCATION, TOWNSHIP HIGH SCHOOL DISTRICT No. 203, et al.,
Defendants.
No. 72 C 745

MEMORANDUM OPINION AND ORDER.

This matter is before the Court on cross motions for summary judgment. Plaintiff's motion is denied. Defendants' motion is granted.

Plaintiff was hired by the Board of Education of Township High School District No. 203 to teach during the 1970-71 school year. By letter dated March 23, 1971, Christensen was advised by William H. Cornog, superintendent of New Trier Township High Schools, that his employment would be terminated at the end of the 1970-71 school year. At that time plaintiff did not have tenure.

This suit is brought pursuant to 42 U. S. C. § 1983. The complaint alleges that plaintiff was denied due process and equal protection under the law in violation of the Fourteenth Amendment to the Constitution of the United States in that the

defendants refused to advise plaintiff of the specific reasons for their decision to terminate his employment, to furnish him with a bill of particulars and to grant him a prompt and speedy hearing. This Court has jurisdiction pursuant to 28 U. S. C. § 1343(3).

So that the constitutional issues are in perspective certain factual background is needed. On May 27, 1971, plaintiff received a letter from David H. Cox, who was principal of the school at which plaintiff taught. The letter set forth the school board's reasons for its decision to terminate plaintiff's employment. Christensen then made a demand upon the board for a bill of particulars and a hearing, which demand was denied by the board in a letter dated June 9, 1971. Thereupon, plaintiff retained counsel, who in turn made a written demand for a hearing upon defendant Seymour Gale, president of the school board. In response thereto, a hearing was held on January 17, 1972.

In his briefs on the cross motions for summary judgment, plaintiff concedes that the reasons given by the board would justify termination of his employment. He argues, however, that there was insufficient factual support for the board's decision. His principal contention is that the hearing before the school board violated his due process rights in that the testimony of certain witnesses was based on hearsay. The cross motions therefore present two separate questions: (1) Is a hearing constitutionally required when a school board decides to terminate the employment of a nontenured teacher and (2) If so, did the hearing in the instant case satisfy the procedural due process requirements of the Constitution?

This case is analogous to the recently decided case of *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 92 S. Ct. 2701 (1972). There the Supreme Court, 92 S. Ct. at 2705, stated that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property."

The Court found in that case that under Wisconsin law a non-tenured teacher did not have a property interest in re-employment that would invoke the due process protection. Similar provisions exist in Illinois, Ill. Rev. Stat. ch. 122, §§ 24-10, 24-11, which means that if plaintiff is to prevail on his claim to a hearing, it would have to be because a constitutionally protected "liberty" has been threatened.

In *Roth*, 92 S. Ct. at 2707, the Court stated that "[t]here might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated." It concluded that the record did not present such a case, but it remanded the matter for further proceedings. Footnote 13 appears to have left open the question as to whether non-retention would have a significant enough impact on career interests to invoke procedural due process guarantees. The plaintiff would appear to have a heavy burden for, in that same footnote, the Court noted:

> "Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.' Cf. Schware v. Board of Bar Examiners, [353 U. S. 232 (1957)]".

See also: *Lipp* v. *Board of Educ.*, 71-1912 (7th Cir. November 27, 1972); *Johnson* v. *Fraley*, 41 L. W. 2290 (4th Cir. November 20, 1972).

Plaintiff has submitted an affidavit to support his contention that he could not obtain employment in his chosen profession by reason of defendants' refusal to renew his contract. Defendants argue that the affidavit actually refutes this contention. In any event, on the documents, there exists a genuine issue of material fact as to the plaintiff's right to a hearing, which would bar this Court from granting summary judgment pursuant to Fed. R. Civ. P. 56 on the first question, standing alone.

Assuming *arguendo* that the plaintiff does have a right to due process protection, however, we turn to the second question—whether the steps taken in the instant case satisfied the procedural due process requirements of the Constitution.

The formal requirements of a hearing are determined by weighing the relative importance of the interests involved. *Roth, supra,* 92 S. Ct. at 2705; *Boddie* v *Connecticut,* 401 U. S. 371 (1971); *Goldberg* v. *Kelly,* 397 U. S. 254 (1970); *Hannah* v. *Larehe,* 363 U. S. 420 (1960). Judge Doyle in *Roth* v. *Board of Regents of State Colleges,* 310 F. Supp. 972, 980 (1970), *aff'd,* 446 F. 2d 806 (7th Cir. 1971), *reversed on other grounds,* 408 U. S. 564, 92 S. Ct. 2701 (1972) balanced the competing interests of a professor in continued employment on the one hand, and that of a university in being freely able to select its faculty on the other hand, and decided that due process is satisfied if the teacher is given the reasons for termination and a hearing is provided at which he may respond to the charges. Judge Doyle stated at page 980 that at such a hearing:

> "[t]he burden of going forward and the burden of proof rests with the professor. Only if he makes a reasonable showing that the stated reasons are wholly inappropriate as a basis for decision or that they are wholly without basis in fact would the university administration become obliged to show that the stated reasons are not inappropriate or that they have a basis in fact. . . ."

See also: *Shirck* v. *Thomas,* 447 F. 2d 1025, 1027 (7th Cir. 1971), *vacated on other grounds,* ..... U. S. ....., 92 S. Ct. 2848. *Drown* v. *Portsmouth School District,* 435 F. 2d 1182, 1186 n. 9 (1970).

Because the Court of Appeals for the Seventh Circuit has, in *Schrick* and *Roth,* approved the standard for due process set forth by Judge Boyle, and because subsequent action by the Supreme Court did not overrule that standard, this Court concludes as a matter of law that procedural due process requirements are satisfied if the teacher is given the reasons for termination and is provided an opportunity to rebut those reasons. Only

if the teacher makes a reasonable showing that the grounds are without bases in fact, would the burden shift to the employer to prove its case.

The constitutional issue of whether the school board in the instant case could rely on hearsay evidence is therefore not before the Court, since the burden was not shifted back to the school board. The only issue which plaintiff challenged was regarding his competency as a teacher. On that question there was competent testimony at the hearing.

Because Mr. Christensen was given the reasons for his termination and was given an opportunity to challenge the factual basis for that action, which he failed to do with respect to the reasons at issue here, summary judgment is hereby entered on behalf of defendants in this case.

SO ORDERED.

ENTERED:

/s/ RICHARD W. MCLAREN
United States District Judge

Dated: December 11, 1972

APPENDIX D.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS.

1) The Fourteenth Amendment to the Constitution of the United States, Section 1 reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FILED
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MICHAEL RODAK, JR.

No. 73-1601

In the

Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM E. CHRISTENSEN,

Petitioner,

vs.

BOARD OF EDUCATION TOWNSHIP HIGH SCHOOL DISTRICT NO. 203; SEYMOUR GALE, President of the Board; PETER TODHUNTER, MRS. WILLIAM BOONE, MRS. EDWARD HOFFMAN, MR. STANLEY HUGHEY, MRS. HULBURD WAMPLER, LAWRENCE GOUGLER, Members of the Board; S. FRANCIS OVERLAN, Acting Superintendent; DAVID H. COX, Principal; ERLE W. LAIR, Director of Student Services; ANN ALBERT, Director of Instructional Services; ROBERT W. JEWELL; Administrative Supervisor,

Respondents.

BRIEF IN OPPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner, William E. Christensen (formerly an untenured teacher employed by Respondents), has failed to set forth in his Petition any persuasive grounds for the granting of such Petition. The refusal of Respondents to renew Petitioner's teaching contract was sustained by

the Court of Appeals upon two grounds; (1) he was not entitled to a hearing, (2) he received a full and fair hearing.

1. PETITIONER WAS NOT ENTITLED TO A HEARING

The decision of the Court of Appeals is not conflict with any decision of any other Court of Appeals in a similar case. Petitioner has cited only one other decision of a Court of Appeals, and that is *Wilderman* v. *Nelson*, 467 F.2d 1173 (8th Cir. 1972). The *Wilderman* decision related to a nontenured social worker, and the court there found that the findings of the administration of the St. Louis City Welfare Office might

> "imply that Wilderman was disloyal to her superiors and thereby brand her as an undesirable employee." (467 F.2d at 1176)

It was the finding of disloyalty that caused the Court of Appeals to determine that a "stigma" might attach which Miss Wilderman was entitled to challenge in a hearing.

There was no such implication of disloyalty in any of the findings of the Christensen record. It was simply a matter of determining whether or not Mr. Christensen met the qualifications which New Trier deemed necessary or appropriate for a member of its faculty.

Consequently, the Christensen case is one which particularly fits within the footnote which appears in *Board of Regents* v. *Roth*, 408 U.S. 564, 33 L.Ed.2d 548 (see footnote at p. 559 of 33 L.Ed.2d).

Petitioner Christensen has failed to demonstrate that the decision of the Court of Appeals for the Seventh

Circuit was in conflict with any applicable decision of this Court. The *Roth* case is completely dispositive of the questions raised, in so far as Petitioner argues that he was entitled to a hearing as a matter of right, and was relied upon by the Court of Appeals in its decision.

2. PETITIONER RECEIVED A FULL AND FAIR HEARING

On the second point, i.e, that the hearing received was inadequate, Petitioner repeatedly asserts that the evidence at the hearing was "pure hearsay." (Petition for Writ of Certiorari, pp. 2, 4, 5, 10, 11, 12).

The Court of Appeals particularly found that

> "The hearing the Board held in plaintiff's case was full and fair." (Petition for Writ of Certiorari, p. A3)

In addition, the Court of Appeals particularly found that Petitioner's characterization of the record as containing only hearsay was erroneous. (Petition for Writ of Certiorari, p. A4)

The District Court also, specifically found that

> "The only issue which plaintiff challenged was regarding his competency as a teacher. On that question there was competent testimony at the hearing." (Petition for Writ of Certiorari, p. A10)

It is evident that Petitioner's insistence that the failure to renew his contract was based upon "pure hearsay" is factually false as found by both the trial court and the Court of Appeals.

The cases relied upon by the Petitioner as establishing the law of the State of Illinois with respect to the use

of hearsay in administrative proceedings do not support Petitioner's position which he sets forth on page 7 of the Petition.

In *Werner* v. *Community Unit School District No. 4*, 40 Ill. App. 2d 491 (which involved a *tenured* teacher), the Court pointed out that major portions of the evidence offered consisted of hearsay, but then recited that there was competent evidence in the record, and

> "that the causes, or at least some of them, set out in the Notice of Dismissal as reasons for the dismissal of plaintiff is (sic) supported by competent substantial evidence." (Op. cit. 497)

Consequently, the case stands for the proposition that as long as there is substantial competent evidence supporting some of the reasons for dismissal, the fact that hearsay (even prejudicial hearsay) is admitted does not vitiate the findings of the School Board and, certainly, does not constitute denial of due process of law.

The case of *Chandler* v. *East St. Louis School District 189*, 35 Ill. App. 2d 317 (again involving a tenured teacher), did not deal with a question of hearsay evidence at all, but involved a severe conflict in the evidence, and the Appellate Court simply sustained the finding of the trial court that the Board's decision was contrary to the manifest weight of the evidence.

The *Allione case*, 29 Ill. App. 2d 261, 173 N.E. 2d 13 (1961), did contain a discussion of hearsay evidence, but finally concluded that there was "no competent evidence" on the issue of whether the teacher's offense was "remediable" (a requirement under Illinois law with respect to tenured teachers).

This Court should not grant certiorari for the purpose of simply reviewing the record of an administrative proceeding to find out whether or not the findings of the Board are supported by competent evidence. Both the trial court and the Court of Appeals have already found such to be the case.

Not only was Mr. Christensen not entitled to a hearing under the decision in *Roth*, but he, in fact, received a full and fair hearing.

It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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